EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PROCEEDINGS AND ORDERS

DATE: 050186

CASE NBR 85-1-01235 CFX
SHORT TITLE Poythress, David B., et al.
VERSUS Kessler, Kathleen

DOCKETED: Jan 21 1986

Date	Proceedings and Orders
Jan 21 1986	Petition for writ of certiorari filed.
Feb 18 1986	Brief of respondent Kathleen Kessler in opposition filed.
Feb 19 1986	DISTRIBUTED. March 7, 1986
Mar 12 1986	REDISTRIBUTED. March 21, 1986
Mar 31 1986	REDISTRIBUTED. April 4, 1986
Apr 7 1986	REDISTRIBUTED. April 18, 1986
Apr 21 1986	Petition DENIED. Dissenting opinion by The Chief Justice with whom Justice White joins. (Detached opinion.)

****

85-1238

No.....

In The

Supreme Court of the United States

October Term, 1985

DAVID B. POYTHRESS, *et al.*,

Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT and KATHLEEN KESSLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MICHAEL J. BOWERS
Attorney General of Georgia

H. PERRY MICHAEL
First Assistant Attorney General

JIM O. LLEWELLYN
Senior Assistant Attorney General

PATRICK W. McKEE
Assistant Attorney General

HAMILTON LOKEY
Special Assistant Attorney General

Counsel for Petitioners

PLEASE ADDRESS ALL COMMUNICATIONS TO:

MICHAEL J. BOWERS
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-4168

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Whether an exception to the well-established principle that a *pro se* plaintiff may not recover attorney's fees under 42 U.S.C. § 1988 should be granted to an attorney who sues on her own behalf.

PARTIES

The parties to this Petition are George D. Busbee, former Governor of Georgia; Joe Frank Harris, Governor of Georgia; David B. Poythress, former Secretary of State of Georgia; Max Cleland, Secretary of State of Georgia; Jesse G. Bowles, former Associate Justice of the Supreme Court of Georgia; Hardy Gregory, Jr., Associate Justice of the Supreme Court of Georgia, as Petitioners; Elizabeth B. Duncan, Elizabeth N. Stout, and Kathleen Kessler, as Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No.....

In The

Supreme Court of the United States

October Term, 1985

DAVID B. POYTHRESS, *et al.*,

Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT and KATHLEEN KESSLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit *en banc*, entered in this proceeding on December 12, 1985.

OPINIONS BELOW

There are two opinions below which deal with the attorney's fees issue now before this Court.[1] The opinion of

[1]There are a number of opinions below dealing with the merits of this case not now before this Court. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga. 1981), *aff'd*, 657 F.2d 691 (5th Cir., Unit B, 1981), *cert. granted*, 455 U.S. 937, *cert. dismissed*, 459 U.S. 1012 (1982).

the United States Court of Appeals for the Eleventh Circuit, *en banc*, is not yet reported, and appears as Part I of the Appendix hereto. The opinion of the United States District Court for the Northern District of Georgia is reported as *Duncan v. Poythress*, 572 F. Supp. 776 (N.D. Ga. 1983), and appears as Part II of the Appendix hereto. The judgment of the Court of Appeals appears as Part III of the Appendix hereto.

o

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit on rehearing *en banc* was entered December 12, 1985. This petition was filed within 90 days of the judgment of the Court of Appeals. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

o

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are

deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial, and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

o

STATEMENT OF THE CASE

This controversy arises over a motion for attorney's fees under 42 U.S.C. § 1988. Plaintiffs Duncan and Stout began the action on which the motion is based by filing a complaint pursuant to 42 U.S.C. § 1983. This action was filed against a number of Georgia officials who are the Petitioners herein. At the time of the filing of the complaint, Kathleen Kessler—the one who now seeks attorney's fees as a Plaintiff—was one of three attorneys for Plaintiffs Duncan and Stout.

On the eve of trial the Plaintiffs filed an amendment to their complaint seeking to name Kessler as a Plaintiff. As Kessler herself describes it, the decision to have her become a Plaintiff was a tactical decision "to

strengthen Plaintiffs' case" by having Kessler testify. On Plaintiffs' motion, objected to by Defendants, Kessler became a Plaintiff and was allowed to testify. However, because of ethical considerations, Kessler was prohibited by the trial court from remaining as an attorney in the case and was required to withdraw as counsel[2] before the amendment to the complaint and her testimony were allowed. At trial Kessler testified to a conversation she had with one of the Defendants.

The Plaintiffs prevailed at trial, and the trial court awarded the Plaintiffs reasonable attorney's fees pursuant to 42 U.S.C. § 1988. The Court of Appeals affirmed; this Court granted certiorari, but certiorari was later dismissed. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir., Unit B, 1981), *cert. granted*, 455 U.S. 937, *cert. dismissed* 459 U.S. 1012 (1982). Defendants' motion for relief from order and judgment was denied.

Upon request by counsel for Plaintiffs Duncan and Stout, attorney's fees were paid. However, the Defendants refused payment of attorney's fees to Kessler as Plaintiff *pro se*, and thus Kessler applied to the trial court for fees.

Kessler's application for fees sought payment for the full amount of time she was involved in the case.[3] De-

---

[2]Kessler asserts that she later appeared as counsel in this case. In support of this assertion she refers to a brief she filed *pro se* in this Court. Whether such a filing constitutes an appearance as counsel is an issue which can be decided only by this Court. See App. 20. (Dissent of Chief Judge Godbold).

[3]While the court below decided that Kessler should also have been granted fees for the time she was involved only as an attorney prior to her becoming a party, that issue is not raised in this petition.

fendants opposed this motion on the ground that a *pro se* litigant is not entitled to attorney's fees. Kessler countered that a *pro se* plaintiff who is an attorney does not fall under the general rule. The trial court agreed with the Defendants, holding as a matter of law a *pro se* litigant—even a *pro se* litigant who is an attorney—is not entitled to an award of fees under 42 U.S.C. § 1988.

Kessler appealed. A panel of the Court of Appeals reversed. Defendants made a timely suggestion for rehearing *en banc* which was granted, vacating the panel decision. The United States Court of Appeals for the Eleventh Circuit sitting *en banc* decided, with three dissents, that an exception to the well-established principle that a *pro se* plaintiff may not recover attorney's fees under 42 U.S.C. § 1988 should be granted to an attorney who sues on her own behalf. The Court of Appeals further held that of necessity the ethical prohibition against a lawyer performing the dual role of advocate and witness must be abolished for an attorney appearing *pro se*.

REASONS FOR GRANTING THE WRIT

I. Conflicts With Appellate Court Decisions

A. The Court of Appeals decision is in direct conflict with the well-established principle that a pro se plaintiff may not recover attorney's fees under 42 U.S.C § 1988.

This Circuit decision is clearly in conflict with the decisions of the First, Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuits. Indeed, every Circuit—including the fore-

runner of the Eleventh Circuit[4]—that has ever considered the question holds that a *pro se* Plaintiff cannot recover attorney's fees under § 1988.[5] *Lovell v. Snow,* 637 F.2d 170 (1st Cir. 1981); *Pitts v. Vaughn,* 679 F.2d 311 (3d Cir. 1982); *Cofield v. City of Atlanta,* 648 F.2d 986 (5th Cir., Unit B, 1981); *Rheuark v. Shaw,* 628 F.2d 297 (5th Cir. 1980), *cert. denied,* 450 U.S. 931 (1981); *Wright v. Crowell,* 674 F.2d 521 (6th Cir. 1982); *Redding v. Fairman,* 717 F.2d 1105 (7th Cir. 1983), *cert. denied,* 104 S.Ct. 1281 (1984); *Davis v. Parratt,* 608 F.2d 717 (8th Cir. 1979); *Turman v. Tuttle,* 711 F.2d 148 (10th Cir. 1983). These cases reason, based upon sound statutory construction, that all *pro se* plaintiffs are outside the class of those intended to be protected by § 1988 since they do not need to hire an attorney to enforce their rights. *See, e.g., Cofield v. City of Atlanta,* 648 F.2d 986 (5th Cir., Unit B, 1981). The Court of Appeals decision, that those *pro se* plaintiffs who are attorneys may recover fees, is thus in clear and direct conflict with this well-established principle.[6] This conflict among the Circuits warrants this Court to grant the Writ.

---

[4]The Eleventh Circuit, in *Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir. 1982), adopted as precedent decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981.

[5]*Ellis v. Cassidy,* 625 F.2d 227 (9th Cir. 1980), contrary to the rule concerning *plaintiffs,* holds that *defendants* who are attorneys and who represent themselves in § 1988 cases are entitled to fees. This rule is based upon considerations not applicable to the present case.

[6]Other than the instant case, only two courts, both at the district level, have considered the issue of a *pro se* plaintiff attorney's entitlement to fees under § 1988. These courts are divided. *Rybicki v. State Board of Elections,* 584 F. Supp. 849 (N.D. Ill. 1984) (attorney *pro se* plaintiff entitled to fees); *Lawrence v. Staats,* 586 F. Supp. 1375 (D.D.C. 1984) (attorney *pro se* plaintiff not entitled to fees).

B. The Court of Appeals abolishes the advocate-witness rule for pro se attorneys in its attempt to reconcile its decision with the principle applicable to all pro se plaintiffs.

The Court of Appeals decision cannot be reconciled with the principle applicable to all *pro se* litigants on the ground that attorneys are somehow different from lay litigants and are, therefore, entitled to more favorable treatment without a significant deviation from acceptable professional ethics: the abolition of the advocate-witness rule for *pro se* attorneys. Attorneys indeed differ from lay litigants, but they do so in ways that argue against treating them more favorably under § 1988 than others and for holding them to a high standard of professional ethics.

One cogent reason for holding *pro se* attorneys to a higher standard than other *pro se* litigants is to prevent the ethically repugnant and professionally unseemly practice of an attorney not only serving as a witness in a case in which he is also acting as an attorney, but also allowing him to *profit* from such behavior. Experience strongly supports the observation that a *pro se* plaintiff is quite likely t. serve as a witness in his own case, as was the situa ion in the instant action. However, an attorney—unlike a lay litigant—is ethically prohibited from acting both as an advocate and as a witness. ABA Model Code of Professional Responsibility (1980) EC 5-9. The Court of Appeals attempts to remedy this problem by taking the inappropriate step of abolishing the advocate-witness rule for the attorney *pro se* litigant. *Cf. Rybicki v. State Board of Elections,* 584 F. Supp. 849, 863-866 (N.D. Ill. 1984) (Grady, J., dissenting in part, concurring in part) advocate-witness rule precludes attorneys *pro se* who tes-

tify from later claiming fees). This attempt by the Court of Appeals to reconcile its decision with the general principle is inappropriate and warrants this Court to grant the Writ.

II. Importance of the Issue

Allowing pro se attorneys to recover fees and abolishing the advocate-witness rule will encourage a cottage industry of underemployed attorneys and will affect both the quantity of federal litigation and the integrity of the judicial process.

There can be little doubt that statutorily provided reimbursement for attorney's fees for the successful litigant has greatly increased civil rights litigation. Much of this litigation is well-founded; some of it is frivolous. To allow attorneys to sue on their own behalf is to increase the burden on an already overloaded justice system by encouraging litigation, much of which does not belong in federal court.

Allowing *pro se* attorneys to recover fees will encourage a cottage industry of underemployed lawyers to file suit over any conceivable wrong—regardless of whether it is one which is proper for federal court resolution.[7] The Court of Appeals dismisses this argument, holding in part that attorneys who bring frivolous suits face sanctions. However, a case need not be without factual foundation to be one which need not become an issue for federal resolution. *See, e.g., Parratt v. Taylor,* 451 U.S. 527 (1981)

[7]The Court of Appeals decision ignores the traditional concept of what constitutes an "attorney": one who acts for *another.* See App. 22. (Dissent of Roney and Henderson, J.J.). This ruling is, therefore, likely to expand prisoner *pro se* litigation as well; "jailhouse lawyers" now have an opportunity to contend they are entitled to fees as their own counsel where they were previously denied as *pro se* litigants.

(federal due process action over a $23.50 hobby kit). Furthermore, the relatively little amount of trouble it takes for an attorney to file suit will result in attorney's fees awards far out of proportion to the wrong corrected. *See, e.g., City of Riverside v. Rivera,* 763 F.2d 1580 (9th Cir. 1985), *cert. granted,* case no. 85-224 (Oct. 21, 1985) (damages of $33,350; attorney's fees of $243,343.75).

The Court of Appeals held that if allowing *pro se* attorneys to collect fees encourages lawyers to search for wrongs (albeit against the lawyers themselves) to sue for, such a result is not contrary to the purposes of § 1988. This result, certain to bring out more litigation, is one which implicates important policies of judicial administration which this Court should decide.

Not only does this result implicate the quantity of litigation faced by the federal judiciary, it will clearly have important implications on the integrity of the judicial process. It is difficult to conceive of a more unseemly display of self-interest than an attorney conducting litigation, testifying on his own behalf, arguing his own credibility, and receiving fees for his services to himself. Yet, because such activities are on their face ethically prohibited to attorneys, the Court of Appeals solves the conflict by removing the ethical prohibition.[8] We submit

[8]The Court of Appeals found that our position against removing the ethical prohibition leads to an anomally: an attorney appearing as a *pro se* plaintiff cannot recover fees, but he could hire an attorney who could perform this service who would, admittedly, be entitled to fees. However, our position supports several important policies; it encourages attorneys not to violate the advocate-witness rule which in turn serves the courts, the profession, and the public; and, it encourages at-

(Continued on following page)

that this ruling implicates the integrity of the judicial process and warrants the grant of the Writ.

—o—

CONCLUSION

For the reasons stated above, we respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

JIM O. LLEWELLYN
Senior Assistant Attorney General

PATRICK W. McKEE
Assistant Attorney General

HAMILTON LOKEY
Special Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

MICHAEL J. BOWERS
Attorney General
132 Judicial Bldg.
Atlanta, Ga. 30334
(404) 656-4585

(Continued from previous page)

torneys to hire others to press their claims which attorneys will be more objective and less likely to assert personally important but legally frivolous claims. If the choice is between awarding fees to an attorney appearing *pro se* or to an advocate appearing in his behalf, we submit that restricting fee awards to advocates appearing on behalf of a potential attorney *pro se* furthers several important public policies that the opposite approach circumvents. These are issues which should be resolved by this Court.

APPENDIX PART I

Appellate Court Decision

Elizabeth D. DUNCAN, et al.,
Plaintiffs-Appellants,
v.
David B. POYTHRESS, et al.,
Defendants-Appellees.

No. 84-8076

United States Court of Appeals,
Eleventh Circuit.

Dec. 12, 1985

Appeal from the United States District Court
for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.*

KRAVITCH, Circuit Judge:

Appellant Kathleen Kessler appeals the denial of her application for attorney's fees pursuant to 42 U.S.C. § 1988. During the early part of this litigation, Kessler represented plaintiffs Duncan and Stout; later in the litigation, after she was added as a plaintiff, Kessler represented herself. The lower court denied fees for the period in which Kessler represented herself under the theory that a lawyer who appears *pro se* is never entitled to attorney's fees under section 1988. The court denied Kessler fees for the time that she represented the other plain-

* Judge James C. Hill recused himself and did not participate in this decision.

tiffs because it concluded that Kessler did not request such fees in her initial application. Finding that the court below erred in both rulings, we reverse.

I. BACKGROUND

Plaintiffs brought this suit pursuant to 42 U.S.C. § 1983 claiming that the refusal of state officials to call a special election to fill a position on the Georgia Supreme Court violated their constitutionally protected right to vote.[1] Elizabeth Duncan and Elizabeth Stout were the only two plaintiffs at the time of the filing of the case and were represented by three lawyers: Kathleen Kessler, William Hollberg, and William Rucker. At the beginning of the trial, plaintiffs moved to amend the complaint to have Kessler added as a plaintiff. Plaintiffs did this because they felt it would be important for Kessler to testify on their behalf.[2] The district court granted plaintiff's motion subject to the condition that Kessler withdraw as co-counsel. Subsequently, Kessler began representing herself as an attorney *pro se* litigant.

Plaintiffs prevailed at trial and on appeal on their section 1983 claim. *Duncan v. Poythress*, 515 F.Supp. 327 (N.D.Ga.), *aff'd*, 657 F.2d 691 (5th Cir. Unit B 1981),

---

1. For the complete facts of the underlying action, see *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. Unit B 1981), *cert. granted*, 455 U.S. 937, 102 S.Ct. 1426, 71 L.Ed.2d 647, *cert. dismissed*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982).

2. Specifically, plaintiffs wanted Kessler to testify about her contact with defendant Bowles prior to the initiation of this suit, regarding his resignation.

cert. granted, 455 U.S. 937, 102 S.Ct. 1426, 71 L.Ed.2d 647, *cert. dismissed*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed. 2d 504 (1982). The trial court also awarded plaintiffs reasonable attorney's fees pursuant to 42 U.S.C. § 1988. *Id.* at 343. In an out-of-court settlement, defendants agreed to pay attorneys Hollberg and Rucker a total of $128,487 in fees, but refused to pay attorney's fees to Kessler. Kessler then applied to the district court for fees.

Kessler's application for fees and brief in support of that application were filed on behalf of "Kathleen Kessler, plaintiff *pro se*." These documents requested fees for the entire time Kessler worked on this case, including both the time that she was counsel of record for plaintiffs Duncan and Stout and the time that she represented herself. The application also analyzed all such time according to the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).[3]

The district court denied Kessler's application for fees because she was a *pro se* litigant. *Duncan v. Poy-*

---

3. *Johnson* lists the following factors to be utilized in determining the proper amount of attorney's fees for claims under section 1988: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and the ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1937-38, 76 L.Ed.2d 40 (1983).

thress, 572 F.Supp. 776 (N.D.Ga.1983). Kessler moved for reconsideration under the theory that, even if she was not entitled to fees for the time that she represented herself, she could not be denied fees for the time that she represented the other two plaintiffs. The lower court denied Kessler's motion based upon its finding that she had failed to raise this ground for recovery earlier.

II. ATTORNEY'S FEES FOR LAWYER *PRO SE* LITIGANTS

The question before this court is whether attorneys who proceed *pro se* should be treated like other attorneys (prevailing plaintiff's attorney(s) presumptively entitled to fees[4]) or like lay *pro se* litigants (not entitled to fees) for the purposes of section 1988.

The court below denied Kessler's application for fees based on *Cofield v. City of Atlanta*, 648 F.2d 986 (5th Cir. Unit B 1981),[5] in which the court denied fees to the plaintiff, a nonlawyer, who appeared *pro se*.[6] The specific

4. A prevailing plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " S.Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.Code Cong. & Ad. News 5908, 5912 (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)); *Hensley v. Eckerhart*, 103 S.Ct. at 1937.

5. The Eleventh Circuit, in *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982), adopted as precedent decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981.

6. A number of other courts have also denied lay *pro se* litigants fees pursuant to section 1988. *E.g., Turman v. Tuttle*, 711 F.2d 148 (10th Cir.1983); *Pitts v. Vaughn*, 679 F.2d 311 (3d Cir.1982); *Wright v. Crowell*, 674 F.2d 521 (6th Cir.1982); *Lovell v. Snow*, 637 F.2d 170 (1st Cir.1981); *Davis v. Parratt*, 608 F.2d 717 (8th Cir.1979).

issue of fees for a lawyer appearing *pro se* was not addressed in *Cofield*. *Cazalas v. United States Department of Justice*, 709 F.2d 1051, 1055 n. 8 (5th Cir.1983); *Ehlers v. City of Decatur*, 696 F.2d 1006 (11th Cir.1983) (unpublished opinion). Only one Court of Appeals, the Ninth Circuit, has considered the issue of whether a lawyer litigant proceeding *pro se* is entitled to attorney's fees under section 1988. *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir.1980). The *Ellis* Court determined that defendants who were attorneys and who represented themselves were entitled to fees. Although *Ellis* is unlike the present case in that it concerned an attorney *pro se* defendant, the *Ellis* court's reasoning is, in large part, applicable to the present case. Indeed, *Ellis* was cited as persuasive authority in *Rybicki v. State Board of Elections*, 584 F.Supp. 849 (N.D.Ill.1984) (three-judge court) where an attorney *pro se* plaintiff was granted fees under section 1988. *But see Lawrence v. Staats*, 586 F.Supp. 1375 (D.D.C.1984) (attorney *pro se* plaintiff not entitled to fees).[7] Circuit courts are divided

7. The *Rybicki* and *Lawrence* courts, with their contrary results, are the only two federal district courts, other than the court below, to explicitly deal with this issue.

In *Durham v. Brock*, 498 F.Supp. 213, 225-26 (M.D.Tenn. 1980), *aff'd* 698 F.2d 1218 (6th Cir.1982), a district court denied fees to an attorney *pro se* litigant who prevailed in his claim that Tennessee's rules regarding advertising by attorneys violated the first amendment. The court, however, did not specifically address the question of whether lawyers who represent themselves are entitled to fees under section 1988; rather, the court used its discretion to deny fees under the particular circumstances of that case. In *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 578 F.2d 34 (2nd Cir.1978), the Second Circuit awarded attorney's fees to a legal services corporation office that brought suit on behalf of the corporation and individual lawyers employed by the corporation. The court found that although none of the farm workers, who normally made up the office's clientele, were plaintiffs in the suit, Mid-Hudson Legal Services acted solely on the farm workers' behalf and in pursuance of its own congressional directive to provide legal services to farm workers.

as to whether attorney *pro se* litigants are entitled to fees in contexts other than section 1988. *Falcone v. Internal Revenue Service*, 714 F.2d 646 (6th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1689, 80 L.Ed.2d 162 (1984) (attorney-litigant in Freedom of Information Act (FOIA) suit denied fees); *Cazalas v. United States Department of Justice*, 709 F.2d 1051 (5th Cir.1983) (attorney-litigant entitled to fees in FOIA case); *White v. Arlen Realty and Development Corp.*, 614 F.2d 387 (4th Cir.), *cert. denied*, 447 U.S. 923, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980) (fees denied attorney-litigant in Truth In Lending Act case); *Cuneo v. Rumsfield*, 553 F.2d 1360 (D.C.Cir.1977) (FOIA attorney-litigant entitled to fees, but nonattorneys also entitled to fees in D.C. Circuit. *Cox v. United States Department of Justice*, 601 F.2d 1 (D.C.Cir.1979)).[8]

The plain language of section 1988 does not preclude an award of fees to a lawyer representing herself. The statute states in pertinent part:

---

8. In several other cases involving attorney's fees requests pursuant to various statutes, courts have noted that the prevailing *pro se* plaintiff seeking attorney's fees was not a lawyer. *E.g.*, *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir.1983); *Owens-El v. Robinson*, 694 F.2d 941, 942 (3d Cir.1982); *Pitts v. Vaughn*, 679 F.2d 311, 313 (3d Cir.1982); *Clarkson v. IRS*, 678 F.2d 1368, 1371 n. 3 (11th Cir.1982); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1090 (5th Cir. Unit A 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1454, 71 L.Ed.2d 665 (1982); *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 921 (1st Cir. 1980); *Hannon v. Security National Bank*, 537 F.2d 327, 328-29 (9th Cir.1976). Thus, these courts, although not confronted with an attorney *pro se* litigant, have recognized that a lawyer is differently situated from a lay litigant for the purposes of a fee award.

> In any action or proceeding to enforce a provision of [section] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Moreover, this court has determined that section 1988 "should be accorded broad interpretation since the statute is remedial in nature." *Williams v. City of Fairburn*, 702 F.2d 973, 976 (11th Cir.1983). Thus, the absence of any express prohibition strongly suggests allowance of a fee award, unless the legislative history provides otherwise. The legislative history of section 1988 does not address this issue.

Absent express language in either the statute itself or its legislative history, we look to the purposes of section 1988 to determine whether granting attorney's fees to attorney *pro se* litigants would further those purposes. Defendants assert, and the lower court found, that Kessler is not entitled to attorney's fees because "section 1988 is designed to assist average citizens who, were it not for the attorney's fees provision, would lack the ability to effectively pursue meritorious complaints." 572 F.Supp. at 778. Although Congress certainly intended section 1988 to help those without the financial resources to hire a lawyer, to the extent that the court below relied on the rationale that section 1988 is *only* intended to help those who cannot otherwise afford legal assistance, such reliance is misplaced. A plaintiff's lawyer is not denied fees under section 1988 merely because the plaintiff is able

to pay for a lawyer, *see, e.g., Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir.1980);[9] *International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502, 503 (5th Cir.1980), or because plaintiff is not actually required to pay his or her lawyer. *See, e.g., Johnson v. University College*, 706 F.2d 1205, 1210 (11th Cir.), *cert. denied*, 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983); *Watkins v. Mobile Housing Board*, 632 F.2d 565, 567 (5th Cir.1980); *Ellis v. Cassidy*, 625 F.2d at 230. Thus, the financial need of the litigant is not the determinative factor in awarding fees under section 1988.[10]

Moreover, contrary to the implication of defendants' argument, the fact that Kessler is a lawyer and therefore can (and did) provide legal representation to herself, does not mean that she does not need section 1988 in order to enable her to pursue a case like the present one. Merely because plaintiff Kessler need not pay an actual fee to attorney Kessler does not mean that she is able to spend the time and pay the overhead involved in this case, ab-

9. The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

10. The District of Columbia district court provides a narrower interpretation. In *Lawrence v. Staats*, 586 F.Supp. 1375 (D.D.C. 1984), that court focuses on the financial need of the litigant as a prerequisite to fees, concluding that "the law need only provide that litgants with meritorious claims will be compensated for actual funds expended to pay for an attorney's services in order to achieve that goal [meaningful access to the courts]." *Id.* at 1379. We, of course, follow the binding precedent of this circuit cited in the text to the effect that expending funds is not a prerequisite to a fee award.

sent at least the hope of remuneration. *See Cazalas*, 709 F.2d at 1057.[11] In fact, preclusion of other employment by the attorney is one of the *Johnson* factors. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 718. This factor is no less relevant when the attorney is the section 1983 plaintiff rather than any other person. *See Ellis*, 625 F.2d at 231 ("The appellees [attorney *pro se* defendants] have actually suffered pecuniary loss, since they have been required to take time away from their practices to prepare and defend the suit.");[12] *Rybicki*, 584 F.Supp. at 860 (A *pro se* lawyer "actually suffers a pecuniary loss due to the time lost from the lawyer's practice.")[13] As Kessler points out, another more general purpose of section 1988 is to encourage private citizens to vindicate important consti-

11. The lower court, again relying on *Cofield*, determined that *Cazalas* is inapplicable to the present case because it concerned fees under FOIA. *Cofield* found FOIA fee cases inapplicable to the section 1988 context because the "history, language, and purpose of the Freedom of Information Act differ significantly from those of the civil rights statutes. . . ." 648 F.2d at 988. For example, FOIA actions are likely to be brought *pro se*, damages are generally not involved, and fees may be awarded to fulfill a punitive function. *Id.* at 988, n. 4. Both the attorney's fees provision of FOIA and section 1988, however, were enacted as incentives for private individuals to pursue their rights. Thus, these differences do not distinguish the two statutes in terms of the need to compensate attorney *pro se* litigants in order to enable them to pursue such litigation.

12. Although the congressional purposes behind awarding attorney's fees to defendants differ from those behind awarding such fees to plaintiffs, both attorney *pro se* plaintiffs and attorney *pro se* defendants are subject to the same pecuniary loss as a result of *pro se* representation in a section 1983 suit.

13. This loss is distinguishable from opportunity costs lost to a nonlawyer litigant because the congressional intent behind section 1988 was to provide *legal* services as discussed *infra*.

tutional and congressional policies. *See* S.Rep. No. 1011, 94th Cong., 2d Sess. 2-3, *reprinted in* 1976 U.S.Code Cong. & Ad. News 5908, 5909-10; *Riddell*, 624 F.2d at 543. This is exactly what Kessler and her coplaintiffs did. A fee award is just as necessary to enable plaintiff Kessler to do this as it would be for a nonlawyer.

Defendants also assert that, in the present case, it was not necessary for Kessler to represent herself[14] because

---

14. Defendants attempt to rely on a different characterization of the facts in another of their arguments. They argue that Kessler "withdrew as counsel and never again appeared as counsel in this case" and thus is not entitled to attorney's fees. Defendants raised this issue for the first time before the *en banc* court. In fact, defendants stated in their brief before the panel that "The Trial Court did not allow Kessler to testify and also represent the plaintiffs, *though she was allowed to represent herself.*" (emphasis added). We will not consider this new, contradictory argument, raised for the first time at the *en banc* level. As we stated recently in *United States v. Southern Fabricating Co.*, 764 F.2d 780, 781 (11th Cir.1985):

> Generally, an appellate court will not consider a legal issue or theory raised for the first time on appeal. *Sanders v. United States*, 740 F.2d 886, 888 (11th Cir.1984). The decision whether to consider such an argument is left to the appellate court's discretion. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826, 837 (1976); *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 989 (11th Cir.1982) (quoting *Singleton*). In exercising this discretion, "we will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice." *Id.* at 990; *see Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir.1976).

In the present case, it is clear beyond doubt that Kessler represented herself for significant periods of time after withdrawing as co-counsel for the other plaintiffs. For example,

(Continued on following page)

the other two plaintiffs' attorneys could have represented Kessler as well with no appreciable additional effort on their part. The problem of redundant legal services is exactly the type of issue with which the *Johnson* factors are designed to deal. 488 F.2d at 717. The existence of other counsel in the case goes to the amount of fees to which Kessler may be entitled, an issue not before this court, not to her entitlement to fees as an attorney *pro se* litigant.

Defendants' assertions that Kessler is not entitled to fees, either because as a lawyer she has free access to the legal system or because other lawyers were available to represent her, are unpersuasive. Under either of these rationales, had Kessler retained additional counsel to represent her in this litigation, such counsel would not have been entitled to fees under section 1988. Yet, defendants admit that attorney's fees would have been allowed to a lawyer hired by Kessler to represent her. Thus, defendants are asserting the anomalous position that Kessler could have hired any other lawyer besides Kessler and that lawyer would have been entitled to fees. A related anomaly is the fact that anyone else could have hired Kess-

---

(Continued from previous page)

she filed a separate brief as "Kathleen Kessler, Respondent, *pro se*" before the Supreme Court. No objection was raised by defendants. Moreover, in any event, this issue could only affect the *amount* of fees to which Kessler is entitled, a question for the district court, and not the significant question of law that this court has determined warrants *en banc* review. We note that our remand to the district court for the determination of the amount of the fee award necessarily will require that the district court make a specific finding as to the stage in the proceeding at which Kessler began representing herself as a lawyer and the length of time involved in such representation. *See supra* note 3.

ler to be his or her lawyer and, if that plaintiff had prevailed as Kessler did here, Kessler would have been entitled to fees.

This second anomaly illuminates the distinction between an attorney *pro se* litigant and a lay *pro se* litigant. A lay *pro se* litigant could not be hired by someone else to represent him or her in a section 1983 suit; an attorney *pro se* litigant could be. As pointed out in *Cofield*, the case relied on by the court below, section 1988 was enacted to "enable and encourage a wronged person to retain a lawyer." 648 F.2d at 988;[15] *see also Ellis*, 625 F.2d at 231 ("Legal services have actually been performed"); *Rybicki*, 584 F.Supp. at 859 ("The courts [in denying lay *pro se* litigants fees] reason that the principal purpose of § 1988 (to encourage lay persons to retain lawyers in meritorious civil rights cases) is not furthered by compensating a non-lawyer litigant who decides to proceed *pro se*."). The court below echoed these sentiments: "The primary concern of Congress was to increase the level of competence with which such complaints are prosecuted . . . ." 572 F.Supp. at 778-79; *see also Lawrence*, 586 F.Supp. at 1379.

---

15. The *Cofield* court refers to section 1988's purpose as encouraging legal representation throughout the course of the opinion: "Congress specifically approved the standards established in *Johnson v. Georgia Highway Express* and its legacy, pointing out that '[t]hese cases have resulted in fees which are adequate to *attract competent counsel*, but which do not produce windfalls . . .' S.Rep. No. 94-1011, 94 Cong.2d Sess. 6, *reprinted in* [1976] U.S.Cong. & Ad.News 5908, 5913." 648 F.2d at 987 (emphasis added); "[i]t is apparent that Congress thought that such people ought to have access to *legal representation*." *Id.* at 988 (emphasis added). The *Cofield* court pointed out that although lawyers are not the only ones who can be worthy advocates, the congressional purpose behind section 1988 was to attract those with legal training.

In the case of an attorney *pro se* litigant such as Kessler, this congressional purpose is fulfilled. Kessler utilized a lawyer to pursue her claims; therefore, she utilized the kind of skilled advocate competent to pursue legal claims, as evidenced by a license to practice law, that the framers of section 1988 envisioned. The fact that the lawyer she chose was herself is inconsequential. Thus, although we agree with the court below that section 1988 was not passed solely for the benefit of lawyers,[16] it was passed so that plaintiffs, lay or lawyer, could have legally trained representatives in cases, like the present one, where important constitutional rights are at stake.[17]

---

16. We do note, however, that another purpose behind section 1988 is to aid lawyers. As we stated recently in *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir.1983): "Attorneys' fees and expenses are awarded not only to make it possible for non-affluent litigants to obtain legal representation, but to *reward* attorneys whose service has benefitted the public interest." *Id.* at 1191 (emphasis in original). *See also Jonas v. Stack*, 758 F.2d 567, 569 (11th Cir.1985) (section 1988 "provides an incentive for both citizens and members of the bar to act as 'private attorneys general' to insure effective enforcement of these civil rights laws") (citing *Dowdell*).

17. Defendants also claim that an attorney-client relationship is the prerequisite to a fee award, citing *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977) where the court stated:

> The existence of an attorney-client relationship, a status that exists wholly independently of compensation, is all that is required [to qualify for attorney's fees under section 1988]. Congress did not intend that vindication of statutorily guaranteed rights would depend on the private party's economic resources or on the availability of free legal assistance.

Id. at 164. The *Gore* court, however, was not considering *pro se* representation, but rather, whether financial need was a prerequisite to an award. The court's coments on the attorney-client relationship were mere dicta.

A further distinction between a lay *pro se* and an attorney *pro se* litigant is the fact that a lay *pro se* litigant cannot sell legal services in the open market. Section 1988 case law tells us that the amount of fees a lawyer recovers is not what that lawyer would have actually earned in another case, but rather, what the market value for such services was. *See Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984). *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 718. Thus, a federally funded Legal Services Corporation lawyer with the same credentials as a lawyer with a lucrative private practice is awarded the same fee under section 1988. *See, e.g., Johnson v. University College*, 706 F.2d at 1210; *Watkins*, 632 F.2d at 567. The lay litigant's services have no market value as legal services since a lay person cannot sell legal services in the marketplace. In addition, the *Johnson* factors include opportunity costs, 488 F.2d at 718, and such costs would be much more complicated to evaluate for the lay litigant. *See Cazalas*, 709 F.2d at 1057,[18] *Ellis*, 625 F.2d at 231.

Several policy arguments have been raised to support denying fees to attorney *pro se* litigants, none of which we find persuasive. First, it has been claimed that a lawyer representing himself or herself lacks the objectivity neces-

18. Again, the fact that *Cazalas* concerned fees under FOIA does not undermine its authority here because the distinctions between FOIA and section 1988 (see discussion in note 11, *supra*), do not affect the feasibility of calculating fees for attorney and lay *pro se* litigants.

sary to provide a check against groundless or frivolous litigation.[19] As the *Cazalas* court found in regard to FOIA, however, section 1988 was not enacted to ensure objective representation, but rather, to promote vigorous advocacy. 709 F.2d at 1056. Counsel representing plaintiffs are often committed to a certain social ideology and thus are not totally independent or objective. In addition, a lawyer-litigant, like any other lawyer, only receives compensation if he or she prevails. A groundless case, of course, would not prevail. Moreover, a lawyer who brings a frivolous suit may be liable for defendants' attorney's fees under the standard set out by the Supreme Court in *Christiansberg Garment Company v. E.E.O.C.*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) ("a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith").[20] *See also* Fed.R.Civ.P. 11 (lawyer, or party if unrepresented, must sign every pleading, motion,

19. Lack of objectivity has been used to support denying attorney's fees to lay *pro se* litigants. *See, e.g., Pitts v. Vaughn*, 679 F.2d 311, 312 (3d Cir.1982). A lawyer, however, unlike a lay litigant, has been trained to distinguish meritorious claims from frivolous ones. *Cf. Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089-90 (5th Cir. Unit A 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1454, 71 L.Ed.2d 665 (1982). *But see Falcone*, 714 F.2d at 647; *White v. Arlen Realty Development Corp.*, 614 F.2d at 388.

20. The some standard has been applied to awards of attorney's fees to prevailing defendants under section 1988. *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980).

or other paper certifying that, to the best of the signer's knowledge, it is well grounded in fact and warranted by law or a good faith argument to change existing law, and is not brought for any improper purpose; paper signed contrary to the rule subjects lawyer, party, or both, to sanctions including paying other party's expenses, attorney's fees); Fed.R.App.P. 38 (if court of appeals determines that an appeal is frivolous, it may award just damages and single or double cost to the appellee).

A second argument against awarding fees to attorney *pro se* litigants stems from the fear that a cottage industry will develop among inactive attorneys who will bring section 1983 cases to support themselves. We think this fear is unfounded. Again, only a prevailing attorney will receive remuneration, and attorneys who bring frivolous suits face numerous sanctions. Because an attorney is compensated according to the *Johnson* factors which include legal experience and reputation, an inactive attorney would be compensated at a low rate. Moreover, if applying section 1988 to lawyers who represent themselves encourages lawyers to search for violations of constitutional and statutory rights and then seek to vindicate those rights, such application is not contrary to the purposes of the statute. *See Dowdell v. City of Apopka*, 698 F.2d 1181, 1189, n. 12 (11th Cir.1983) (section 1988 is designed "to induce and encourage litigation on the theory that litigants acting as 'private attorneys general' may help to enforce important congressional policies"). Finally, in the present case, Kessler tried to avoid litigation by requesting defendants to call a special election. Although not forced into this litigation in the same sense as was the

defendant in *Ellis*, Kessler was required to bring suit if she wanted to vindicate her important right of franchise. Thus, we conclude that Kessler is entitled to fees for the period in which she represented herself as an attorney *pro se* litigant.[21]

---

21. A further argument made against awarding attorney's fees to attorney *pro se* litigants is that it encourages lawyers to act as both advocate and witness in contravention of the ethical prohibition against lawyers performing such dual roles. *See Rybicki*, 584 F.Supp. at 860-61 (majority opinion); *id.* at 865-66 (Grady, J., dissenting in part and concurring in part). This prohibition is reflected in the ABA Model Code of Professional Responsibility (1980) which states as an "ethical consideration":

> EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts objectively.

See also EC 5-10, the corresponding "disciplinary rules" DR 5-101 and 5-102, and Model Rules of Professional Conduct Rule 3.7.

Even if Kessler can be said to have violated this ethical cannon, it is not apparent why denial of fees is an appropriate sanction. *See Scope*, Model Rules of Professional Conduct (Proposed Final Draft May 30, 1981). Moreover, the rule is inapplicable to an attorney *pro se* litigant. The ethical canons do not prohibit a lawyer from representing himself or herself, *see, e.g., O'Neal v. Bergan*, 452 A.2d 337, 344 (D.C.App. 1982), and logic tells us that such a *pro se* litigant often testifies on

(Continued on following page)

(Continued from previous page)

his or her own behalf. In addition, the rationales behind the advocate-witness rule do not apply to the attorney *pro se* litigant. As stated by the Supreme Judicial Court of Massachusetts:

> To apply DR 5-102 when the testifying advocate is a litigant in the action miscomprehends the thrust of the rule. DR 5-102 regulates lawyers who would serve as counsel and witness for a party litigant. It does not address that situation in which the lawyer *is* the party litigant. Any perception by the public or determination by a jury that a lawyer litigant has twisted the truth surely would be due to his role as a litigant and not, we would hope, to his occupation as a lawyer. *See International Elecs. Corp. v. Flanger*, 527 F.2d 1288, 1294 (2d Cir.1975). As a party litigant, moreover, a lawyer could represent himself if he so chose.

Borman v. Borman, 378 Mass. 775, 393 N.E.2d 847, 856 (1979) (footnote omitted).

Thus, we conclude that the advocate-witness rule is not applicable to the attorney *pro se* litigant. Moreover, in Kessler's case there are additional reasons why the rule is inapplicable. First, a judge was the trier of fact, thus, there was no danger that the trier of fact could not distinguish between testimony and advocacy. Second, Kessler was not put in the "unseemly and ineffective position of arguing her own credibility" because she did not act as an advocate during the course of the trial, rather, such duties were performed by other lawyers. *Cf. Bottaro v. Hatton Associates*, 680 F.2d 895 (2d Cir.1982); *International Elecs. Corp.*, 527 F.2d at 1294.

Finally, under Ethical Consideration 5-10 and Disciplinary Rules 5-101 and 5-102 of the Model Code, a lawyer can testify if, *inter alia*, the testimony relates solely to an uncontested matter or the testimony is solely a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony. In the present case, Kessler's brief testimony related solely to whether she had gone to see defendant Bowles on December 14, 1980, to ask him about his resignation, and the fact that he refused to answer Kessler's questions. Plaintiff's counsel did not anticipate that this testimony would be contradicted, and indeed, defendant Bowles did not contest the matter. This testimony was introduced by plaintiffs merely to show the element of knowledge on behalf of defendants.

III. FEES FOR PERIOD KESSLER REPRESENTED THE OTHER PLAINTIFFS

In its discussion of the merits, the lower court ordered that "plaintiffs shall recover . . . all reasonable attorney's fees from the defendants for time spent litigating this action. 42 U.S.C. § 1988." 515 F.Supp. at 343.[22] When defendants refused to pay her for her work, Kessler applied to the court for fees. In her petition for fees, Kessler did not distinguish between time spent representing herself and time spent representing the other plaintiffs. As defendants point out, Kessler did not mention the fact that she represented others as a theory for recovery; rather, she only asserted that "[p]laintiff attorney Kessler, representing herself, may recover attorney's fees."

[5-8] The lower court denied Kessler's application for fees based on her position as a *pro se* litigant without commenting on the time that she spent representing the other plaintiffs. Kessler's motion for reconsideration dealt solely with the time that she spent representing the plaintiffs Duncan and Stout. The court below denied this motion, stating that it "has not been informed of the reason Kessler failed to raise previously this issue as to her entitlement to a recovery of fees. . . ." *Duncan v. Poythress*, No. C81-199A, slip op. at 2 (N.D.Ga. Dec. 22, 1983), and that Kessler was now attempting to "raise a different ground for recovery. . . ." *Id.* Although Kessler could have made her fee application clearer, we find that the lower court abused its discretion by using this ambiguity to deny

22. The parties were also directed to attempt to resolve the matter of attorney's fees themselves, and were instructed to petition the court for resolution of the matter if they failed to reach agreement. 515 F.Supp. at 343.

Kessler fees for the hours that she represented the other plaintiffs. The court's finding that, in her first application, Kessler did not apply for fees for the time that she represented the other plaintiffs, was clearly erroneous. A fee application need not assert a theory or ground supporting recovery; rather, it need only document the hours spent—which Kessler's application did.[23] This is so, not only because prevailing plaintiffs are presumptively entitled to fees under section 1988,[24] but also because plaintiffs in the present case had already been granted attorney's fees. 515 F.Supp. at 343. Kessler reasonably assumed that the question of fees for the time that she represented the other plaintiffs was not in issue. Thus, Kessler is entitled to fees for the period in which she represented plaintiffs Duncan and Stout.

For the foregoing reasons, the judgment of the district court is REVERSED and this case is REMANDED for a determination of the amount of Kessler's fee award.

GODBOLD, Chief Judge, dissenting:

The court took this case en banc to decide a legal question. It turns out that the case is not a proper vehicle for decision. The facts have not been sufficiently developed for the court to decide the case with assurance of correctness.

---

23. Kessler's application also applied the *Johnson* factors to the time that she represented the other plaintiffs as well as to the time that she represented herself.

24. *See* note 4, *supra*.

I would remand this case to the panel for proper handling of the § 1988 issue, which would entail the parties stipulating to the facts or a remand to the district court for development of an adequate record covering what happened in the district court and in the Supreme Court. Without such a record we do not know whether the issue on which we took the case en banc is properly before us.

Establishing Kathleen Kessler's status as attorney for herself, in the district court or in the Supreme Court, or both, is a prerequisite for decision of the attorney fee issue. We do not know with certainty whether Kessler served as attorney for herself in the district court after she withdrew as co-counsel and was added as plaintiff. The parties are in dispute about this. The en banc court does not directly address whether as a matter of fact Kessler filed an appearance for herself in the district court, whether she performed acts as an attorney, whether the district court was aware that she purported to represent herself, or whether the district court, if unaware, would have permitted such representation if made aware.

The court refers to Kessler's having filed a brief for herself pro se before the Supreme Court. We do not know whether that Court labored under the same lack of facts concerning events in the district court that we labor under. Whether the Supreme Court, armed with all the facts, would have permitted Kessler to appear, and whether it might now say that her appearance was proper, are matters to which we do not know the answer.

The court finesses the issue of the stage at which Kessler began representing herself by punting to the district court on remand. See footnote 14. The instruction

to the district court, in footnote 14, that it must make a finding as to the stage in the proceeding at which Kessler began representing herself leaves open the possibility that the district court may find that at no time did Kessler ever represent herself in the district court. While not specifically stated in the court's opinion, I assume that the district court also may find that Kessler did not represent herself in the Supreme Court, or if she attempted to do so that the attempt was not proper (for reasons stated in the "Second" point, below, or for any other reasons based upon presently unknown events in the district court or the Supreme Court).

Second, in a situation where we do not know what actually occurred in the district court, the en banc court is intervening in a matter involving district court policy. Initially the district judge thought that Kessler should not be both attorney and witness; it has not been contended that the district court's order requiring her withdrawal as co-counsel was erroneous. If the district court has not had an opportunity to rule on whether it would permit her to reappear (as counsel for herself) despite its prior and uncontested ruling that she could not be both counsel and witness, it is entitled to the first chance to rule.

RONEY, Circuit Judge, dissenting, in which HENDERSON, Circuit Judge, joins:

> *"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."*
>
> *"The question is," said Alice, "whether you can make words mean so many different things."*

> *"The question is," said Humpty Dumpty, "which is to be master—that's all."*
>
> *Alice was too much puzzled to say anything; . . .*[1]

Although not too puzzled to say anything, I am puzzled enough to say very little.

The sole source for the imposition of liability against the defendant for the prevailing plaintiff's attorney's fees in this case is 42 U.S.C.A. § 1988. There Congress provided that in a suit such as this to enforce a provision of 42 U.S.C.A. § 1983, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

This case turns on the meaning of the word "attorney." Although the majority believes the "plain language" of section 1988 "does not preclude an award of fees to a lawyer representing herself," we have simply been unable to find any definition which permits a decision that a *pro se* lawyer has an attorney. Set forth in an Appendix to this opinion are the definitions found in over two dozen dictionaries. Without exception they define the word "attorney" in terms of someone who acts for *another*, someone who is employed as an agent to represent *another*, someone who acts at the appointment of *another*. A basic principle of agency law is that "[t]here is no agency unless one is acting for and in behalf of *another*, since a man cannot be the agent of himself." 2A C.J.S. *Agency* § 27, at 592. For there to be an attorney in litigation there must be two people. Plaintiff here appeared *pro se*. The term

---

1. *Alice Through the Looking Glass*, Lewis Carroll Ch. VI.

"*pro se*" is defined as an individual acting "in his own behalf, in person."[2] By definition, the person appearing "in person" has no attorney, no agent appearing for him before the court. The fact that such plaintiff is admitted to practice law and available to be an attorney for others, does not mean that the plaintiff has an attorney, any more than any other principal who is qualified to be an agent, has an agent when he deals for himself. In other words, when applied to one person in one proceeding, the terms "*pro se*" and "attorney" are mutually exclusive.

Of course, sometimes, like Humpty Dumpty, courts do play the master. *See United States v. American Trucking Association*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940). But when Congress has chosen words with discernible "plain meaning," it is neither necessary nor proper for courts to do so. "Where the language of a statute is not ambiguous and does not lead to absurd results, the job of the courts is to apply it as written." *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 762 (11th Cir.1985).[3]

There is little support anywhere upon which to rest a decision contrary to the common definition of the words used by Congress in this statute. The majority recites

---

2. *See Black's Law Dictionary* 1099 (5th ed. 1979):

   PRO SE. For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court.

3. New York, by rule, has defined "attorney," as used in its civil practice rules, as including any party, whether lawyer or not, prosecuting or defending an action in person. New York C.P. L.R. § 105, McKinnys New York Consolidated Laws 7B § 105(c). *See also* Black's Law Dictionary 118 (5th ed. 1979).

legislative history to justify giving *pro se* litigants attorney's fees in the name of furthering the purposes of the Act. If one cabins the word attorney by its dictionary definition, however, there is not a shred of evidence that Congress would treat *pro se* litigants who happen to be attorneys differently from *pro se* litigants of other vocations, businesses or professions. Differences in qualification between attorneys and non-attorney *pro se* litigants would seem of little analytical use because in both instances the *pro se* party has necessarily prevailed in the litigation, just to make an attorney's fees claim under section 1988. What a *pro se* plaintiff does for a living should be irrelevant for purposes of section 1988 analysis. The costs to an attorney in representing herself may in many instances be no greater than the costs to *pro se* litigants of other vocations taking time from their regular work to present themselves. To argue that an attorney can be an attorney for herself, but a non-attorney cannot because she is not an attorney, is syllogistic at best, and at worst a path to a result without regard to the meaning of words.

A *pro se* lawyer who attempts to act the attorney, rather than a party, has ethical problems not faced by the non-professional. Only if Congress passes a statute to permit all *pro se* parties, or *pro se* attorneys only, to obtain fees for themselves, however, should we be required to address the ethical and legal issues arising from attorneys testifying, attorneys receiving special treatment and non-attorneys receiving attorney's fees.

Here, plaintiff is by profession an attorney. In this case, however, she appeared *pro se*. She had no attorney representing her in this litigation. Since she had no attor-

ney, the defendant should not have to pay any attorney's fees.

I see no objection, however, to the award of attorney's fees earned while the plaintiff was an attorney, representing another, prior to her becoming a party herself.

APPENDIX

American Heritage Dictionary 140 (Second College Ed. 1982):

> attorney . . . A person legally appointed to act for another, esp. an attorney at law.
>
> attorney at law . . . One who is qualified to represent clients in a court of law and to advise them on legal matters; a lawyer.

American Heritage Dictionary of the English Language 85 (1969):

> attorney . . . A person legally appointed or empowered to act for another; especially an attorney at law. . . .
>
> attorney at law. One who is qualified to represent a party in a court of law and to prepare and manage his case; a lawyer.

Black's Law Dictionary 117-18 (5th ed. 1979):

> ATTORNEY: In the most general sense this term denotes an agent or substitute, or one who is appointed and authorized to act in the place or stead of another. . . . In its most common usage, however, unless a contrary meaning is clearly intended, this term means "attorney at law", "lawyer" or "counselor at law". . . .

> The word "attorney" includes a party prosecuting or defending an action in person. . . .
>
> *Attorney at law.* Person admitted to practice law in his respective state and authorized to perform both civil and criminal legal functions for clients, including drafting of legal documents, giving of legal advise, and representing such before courts, administrative agencies, boards, etc.

Bouvier's Law Dictionary (Unabridged) 282-86 (Vol. I 1914):

> ATTORNEY. One put in the place, turn, or stead of another, to manage his affairs; one who manages the affairs of another by direction of his principal. . . .
>
> One who acts for another by virtue of an appointment by the latter. . . .
>
> *Attorney in fact.* A person to whom the authority of another, who is called the constituent, is by him lawfully delegated. . . .
>
> All persons who are capable of acting for themselves, and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of a proper age, and femes coverts, may act as attorneys of others; . . .
>
> *Attorney-at-law.* An officer in a court of justice who is employed by a party in a cause to manage the same for him.

Britannica World Language Ed., Funk & Wagnalls New Practical Standard Dictionary 93 (1957):

attorney . . . A person empowered by another to act in his stead; especially, one legally qualified to prosecute and defend actions in a court of law; an attorney at law; a lawyer. . . . An agent.

attorney at law. An attorney who is qualified to prosecute and defend actions in a court of law; . . .

Century Dictionary & Cyclopedia 374 (Vol. I A-B 1913) *and* 374 (Vol. I A-C 1911):

attorney . . . 1. One who is appointed by another to act in his place or stead; a proxy. . . .

Specifically—2. In *law*, one who is appointed or admitted in the place of another to transact any business for him. . . . An *attorney at law*, sometimes called a *public attorney*, is a person qualified to appear for another before a court of law to prosecute or defend an action on behalf of such other. . . .

attorney . . . The appointment of another to act in one's stead; the act of naming an attorney. . . .

Chambers Twentieth Century Dictionary 66 (1956):

attorney . . . one legally authorized to act for another: one legally qualified to manage cases in a court of law. . . .

Comprehensive Etymological Dictionary of the English Language 125 (1966):

attorney . . . one authorized to act for another. . . .

Concise Etymological Dictionary of Modern English 27 (1952):

attorney . . . to appoint, constitute. . . . Orig. one duly appointed to act for another.

Concise Oxford Dictionary 60 (1976):

attorney . . . One appointed to act for another in business or legal matters . . . qualified lawyer, esp, representing client in proceedings. . . .

Dictionary of Obsolete English 17 (1958):

Attorney. Seldom used now except of the attorney *at law;* being one, according to Blackstone's definition, 'who is put in the place, stead, or *turn* of another to manage his matters of law;' and even in this sense it is going out of honour, and giving way to 'solicitor.' But formerly any who in any cause acted in the room, behalf, or turn of another would be called his 'attorney:' thus Phillips *(New World of Words)* defines attorney, 'one appointed by another man to do anything in his stead, or to take upon him the charge of his business in his absence;' . . .

Dictionary of Word Origins 32 (1945):

attorney . . . If you were in trouble, or were going away, you would select someone to *turn to* . . . to represent you; this man was your *attorney.* Its first meaning was, one assigned to act for another; as still in the expression, *power of attorney.* When you take a *detour,* of course, you *turn away* from the main path.

Funk & Wagnalls Encyclopedic College Dictionary 94 (1968):

attorney . . . A person empower by another to act in his stead; especially an attorney at law. . . .

attorney at law. An attorney who is qualified to prosecute and defend actions in a court of law; lawyer.

Harper Dictionary of Contemporary Usage 54 (1975):

attorney/attorney at law The former is a term that includes all kinds of lawyers. The latter specifically refers to a lawyer who is qualified to represent his clients in a court of law.

Lexicon Webster Dictionary 65 (Vol. One A-Oyster 1976):

attorney . . . A legal agent who represents a client in legal affairs; a lawyer; one who is legally appointed or admitted in the place of another to transact any business for him.

Oxford American Dictionary 39 (1980):

attorney . . . a lawyer, especially one qualified to represent or act for persons in legal proceedings.

Oxford Dictionary of English Etymology 61 (1966):

attorney . . . legal agent.

Oxford English Dictionary 553-54 (Vol. I A-B 1933):

Attorney . . . 1. One appointed or ordained to act for another; an agent, deputy, commissioner. In later times only *fig.* and perhaps with conscious reference to sense. . . . 2. *(Attorney in fact, private attorney.)* One duly appointed or constituted . . . to act for another in business and legal matters, either *generally*, as in payment, receipt, and investment of money, in suing and being sued, etc., or in some *specific* act, which the principal, by reason of absence, is unable to perform in person. Hence the contrast between 'in

person' and 'by attorney,' frequent also in fig. senses. . . . 3. *(Attorney-at-Law, public attorney.)* A professional and properly-qualified legal agent practising in the courts of Common Law . . . one who conducted litigation in these courts, preparing the case for the barristers, or counsel, whose duty and privilege it is to plead and argue in open court. . . .

Oxford Illustrated Dictionary 45 (1962):

attorney . . . One appointed to act for another in business in legal matters.

Oxford Universal Dictionary 120-21 (1933):

Attorney . . . 1. . . . 'one appointed,' . . . 'one who acts *in the turn* of another'. . . . 1. One appointed to act for another, an agent, deputy, commissioner. . . . 2. *(Attorney in fact, private attorney.)* One duly appointed or constituted . . . to act for another in business and legal matters, either *generally*, or in some *specific* act. . . . 3. *(Attorney-at-law, public attorney.)* A properly-qualified legal agent practising in the courts of Common Law . . . one who conducts litigation in these courts, preparing the case for the barristers, who plead in open court. . . .

Attorney . . . 2. . . . The action of appointing a legal representative, procuration. . . .

Attorney . . . to perform by attorney.

Random House Dictionary of the English Language (Unabridged) 96 (1967):

attorney . . . 1. a lawyer; attorney-at-law. 2. an attorney-in-fact, agent. . . . one (who is) turned to, i.e., appointed. . . .

attorney-at-law . . . an officer of the court authorized to appear before it as a representative of a party to a legal controversy.

Shorter Oxford English Dictionary 120-21 (1933):

Attorney . . . 1. . . . 'one appointed', . . . 'one who acts *in the turn* of another'. . . . 1. One appointed to act for another; an agent, deputy, commissioner . . . 2. *(Attorney in fact, private attorney.)* One duly appointed or constituted . . . to act for another in business and legal matters, either *generally*, or in some *specific* act. . . . 3. *(attorney-at-law, public attorney.)* A properly-qualified legal agent practising in the courts of Common Law . . .; one who conducts litigation in these courts, preparing the case for the barristers, who plead in open court. . . .

Attorney . . . 2. . . . The action of appointing a legal representative, . . . procuration. . . .

Attorney . . . To perform by attorney. . . .

Webster's Seventh New Collegiate Dictionary 57 (1969):

attorney . . . one who is legally appointed by another to transact business for him; . . . a legal agent qualified to act for suitors and defendants in legal proceedings. . . .

Webster's Third New International Dictionary 141 (1960):

attorney . . . one who is legally appointed by another to transact any business for him; . . . a legal agent qualified to act for suitors and defendants in legal proceedings. . . .

attorney-at-law . . . a practitioner in a court of law who is legally qualified to prosecute and defend actions in such court on the retainer of clients. . . .

APPENDIX PART II

District Court Decision

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C81-199A

ELIZABETH B. DUNCAN, et al.

vs.

DAVID B. POYTHRESS, et al.

ORDER

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta
October 7, 1983
BEN H. CARTER, Clerk
By: ————, Deputy Clerk

This civil rights action, 42 U.S.C. § 1983, is before the court on (1) the application of plaintiff Kathleen Kessler for attorney's fees; (2) plaintiff Kessler's motion to compel answers to certain interrogatories served on the defendants as part of discovery related to the attorney's fees issue; (3) defendants' motion for a protective order with regard to those interrogatories; (4) defendants' motion to review taxation of costs; and (5) the application of William Hollberg for attorney's fees.

I. Plaintiff Kessler's Application for Attorney's Fees and Related Discovery motions

Plaintiff Kessler's motion for an award of attorney's fees presents a question that has been alluded to but not decided by the courts of this circuit: whether a district

court may award attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, to a pro se litigant who is also an attorney.

A prevailing party will be awarded attorney's fees from the losing party only upon a clear and specific showing that Congress has provided for such an award by statute. *Hensley v. Eckerhart,* 102 S.Ct. 1933, 1937 (1983); *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 260, 95 S.Ct. 1612, 1623 (1975). In section 1988, Congress has authorized district courts to award reasonable attorney's fees to the prevailing party in civil rights litigation. However, section 1988 does not expressly either provide for or prohibit an award of attorney's fees to pro se litigants.

In *Cofield v. City of Atlanta,* 648 F.2d 986, 987-88 (5th Cir. 1981) (Unit B), the former Fifth Circuit held that a prevailing pro se litigant cannot recover attorney's fees under section 1988. Although the court in *Cofield* noted that the plaintiff was not an attorney, *id.* at 987, the court gave no indication whether its holding applied to both pro se attorney litigants and pro se non-attorney litigants.[1]

---

1. In a subsequent opinion in a case involving a request for attorney's fees under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), and the Privacy Act, 5 U.S.C. § 552a(g)(3)(B), Cazalas v. United States Dept. of Justice, 709 F.2d 1051 (5th Cir. 1983), the present Fifth Circuit noted the question whether a pro se attorney litigant could recover an attorney's fees award under section 1988 was "left open" in *Cofield.* 709 F.2d at 1055 n. 8. Notwithstanding the present Fifth Circuit's dictum in *Cazalas,* however, the failure of the court in *Cofield* to expressly limit its holding to one class of pro se litigants imparts a strong presumption against allowing an award for one class but not the other.

In light of the holding of *Cofield*, the issue presented in the instant case is whether in enacting section 1988 Congress intended to draw a distinction between pro se attorney litigants and pro se non-attorney litigants. Nothing in the legislative history of section 1988 discloses such an intention. The purpose of section 1988 was summarized in *Cofield* as follows:

> Elsewhere we have stated that act allowing attorney's fees is "not passed for the benefit of attorneys but to enable litigants to obtain competent counsel. . . ." Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974). Section 1988 was enacted two years after the rendering of the decision in Johnson v. Georgia Highway Express, and the legislative history of the act echoes our statement in that case. Congress specifically approved the standards established in Johnson v. Georgia Highway Express and its legacy, pointing out that "[t]hese cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls. . . ." S.Rep.No. 94-1011, 94th Cong.2d Sess. 6, reprinted in [1976] U.S. Code Cong. & Ad. News 5908, 5913. Congress thought that awards of attorney's fees may be necessary because "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." *Id.* at 2, reprinted in [1976] U.S. Code Cong. & Ad. News, at 5910. "[I]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." Id.
>
> Thus, it is clear to us that the purpose of section 1988 is *not to compensate a worthy advocate but to enable and encourage a wronged person to retain a lawyer.* It is apparent that Congress thought that such people ought to have access to legal representation.

> 648 F.2d at 987-88 (emphasis supplied). *See also Grooms v. Snyder*, 474 F. Supp. 380 (N.D. Ind. 1979). Thus, section 1988 is designed to assist average citizens who, were it not for the attorney's fees provision, would lack the ability to effectively pursue meritorious complaints. As the Senate noted in its report, civil rights laws "depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which those laws contain." S.Rep.No. 94-1011. 94th Cong. 2d Sess. 6, *reprinted in* 1976 *U.S. Code Cong. & Ad. News* 5908, 5910. The primary concern of Congress was to increase the level of competence with which such complaints are prosecuted, not to make whole those who have been put to the time and trouble of advocating their own rights. *See Owens-El v. Robinson*, 694 F.2d 941, 942-43 (3d Cir. 1982).
>
> The court notes that certain statements within the legislative history of section 1988 support the conclusion that the attorney's fees provision was designed, at least in part, to allow successful plaintiffs to recoup the costs of asserting their rights. For example, the Senate Report noted that
>
> > [i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.
>
> *Id.* at 5910. Were this court writing on a clean slate, perhaps such a statement would persuade the court that sec-

tion 1988 was designed to serve a make-whole purpose as well and that section 1988 permits a grant of the award sought by plaintiff Kessler in the instant action. However, the court sees no way to reconcile the allowance of such a compensatory award of fees to a pro se attorney litigant with the prohibition in *Cofield* of the recovery of such an award by one who happens not to be an attorney.

Plaintiff Kessler points out that the distinction between pro se attorney and non-attorney litigants has been drawn by the present Fifth Circuit in a case involving attorney's fees provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E), and the Privacy Act, 5 U.S.C. § 552a(g)(3)(B).[2]

In *Cazalas v. United States Department of Justice*, 709 F.2d 1051 (5th Cir. 1983), that court permitted an award of attorney's fees to a pro se attorney litigant who had prevailed on her claims under both acts. The Fifth Circuit distinguished its holding in *Cazalas* from the holding of the former Fifth Circuit in *Barrett v. Bureau of Customs*, 651 F.2d 1087 (5th Cir. 1981), denying fees under the FOIA to a pro se non-attorney litigant:

> Finally, the government contends that, since the Court has already refused to grant fees to pro se non-attorney litigants based on foregone income, there is no principled basis for reimbursing attorneys for income lost as a result of self-representation. This argument also fails. There are several commendable reasons for making the distinction urged by appellant. Congress sought to encourage legal representation; thus it makes sense to compensate lawyers for this work. Also, in compensating a pro se litigant, the only real measure of approximating fees incurred is the opportunity lost, or work foregone, due to the representation. This is relatively simple to value where the pro se litigant is an attorney, for the work foregone is of the same nature as that actually performed. Such is not the case for non-attorney pro se litigants.

709 F.2d at 1057 (citations omitted).[3] The *Cazalas* court also noted that the FOIA and Privacy Act attorney's fees provisions not only act as incentives for private individuals to pursue vigorously their claims for information, but also serve deterrent and punitive purposes as well. *Id.*

The opinion in *Cazalas*, however, falls short of supporting the drawing of a similar distinction in the instant

---

2. In several other cases involving attorney's fees requests, courts have noted in passing that the prevailing pro se plaintiff seeking attorney's fees was not a lawyer. *E.g.*, Wolfel v. United States, 711 F.2d 66, 68 (6th Cir. 1983); Owens-El v. Robinson, 694 F.2d 941, 942 (3d Cir. 1982); Pitts v. Vaughn, 679 F.2d 311, 313 (3d Cir. 1982); Clarkson v. IRS; 678 F.2d 1368, 1371 n. 3 (11th Cir. 1982); Barrett v. Bureau of Customs, 651 F.2d 1087, 1090 (5th Cir. 1981) (Unit A); Crooker v. United States Dept. of Justice, 632 F.2d 916, 921 (1st Cir. 1980); Hannon v. Security Nat'l Bank, 537 F.2d 327, 328-29 (9th Cir. 1976). Although these courts have noted, and thus lent some support to the drawing of, the distinction between pro se lawyer and non-lawyer litigants, none of these courts faced the question presented here—whether to permit awards to the one class but not the other—and thus their comments in this regard are not particularly helpful.

3. For the same reasons, the decisions of state courts are not persuasive. Moreover, state courts have failed to reach consensus as to the grant or denial of attorney's fees to attorneys who represent themselves. *E.g.*, *compare* Winer v. Jonal Corp. 545 P.2d 1094 (Mont. S.Ct. 1976), and Wells v. Whinery, 34 Mich. App. 626, 192 N.W.2d 81 (1971) (fee awards granted), *with O'Connell v. Zimmerman*, 157 Cal.App.2d 330, 321 P.2d 161 (Cal. 1958), and Los Angeles v. Hunt, 8 Cal.App.2d 401, 47 P.2d 1075 (1935) (no legal fees actually incurred and therefore request for award denied).

case, for two reasons. First the court in *Cofield* expressly disapproved of the application of FOIA cases as controlling authority in deciding attorney's fees requests brought under section 1988:

> In any event, we do not find these [FOIA] cases persuasive authority on the issue before us here. The history, language, and purpose of the [FOIA] differ significantly from those of the civil rights statutes; those differences often render decisions under one of the statutes inapposite to cases arising under the other.

648 F.2d at 988[3] [N.3 *sic*]. The court noted particularly that unlike the FOIA and Privacy Act provisions, section 1988 does not serve a punitive function. *Id.* at 988 n. 4.

Second, the *Cazalas* court's attempt to distinguish between the two classes of pro se litigants is not wholly convincing. Although it is true that a district court can readily calculate the reasonable value of representation by the pro se attorney litigant by examining the amount of work foregone, it is also true that in many, if not all, cases some nonarbitrary value can be assigned to the work foregone by a pro se non-attorney litigant. A plumber, teacher, or dishwasher, for example, could in most instances provide information from which a court could calculate the income foregone as the result of that person's work as a pro se litigant in a civil rights case. Moreover, while it does "make sense" for Congress to compensate lawyers as a means of encouraging legal representation, it makes equally good sense, especially given the *Cofield* holding, to conclude that Congress intended

to provide awards only for plaintiffs who actually seek and obtain independent representation.[4]

For the above reasons, the court concludes that it lacks the discretion to award attorney's fees to plaintiff Kessler under section 1988. The court therefore will deny her request. It follows from this denial that the pending discovery motions, which relate only to the amounts sought in her attorney's fees request, are moot.

II. Defendants' Objections to Plaintiffs' Bill of Costs

Four bills of costs have been filed in this action since this court entered its order of February 2, 1983. William Rucker, one of the plaintiffs' attorneys, filed his bill of costs on February 14, 1983. Because it appears that Rucker has settled his claims for both costs and attorney's fees, releasing defendants from "any and all obligations to [him] arising out of the Order of the Court April 29, 1981," *see* Settlement and Satisfaction of Attorney's Fees, filed May 3, 1983, the court will deny as moot the defendants motion with respect to Rucker's bill of costs.

Plaintiff Kessler filed her first bill of costs on February 15, 1983. On two occasions since, she has submitted

---

4. Equally unpersuasive is the decision of the Ninth Circuit in Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980), allowing an award of attorney's fees to pro se attorney defendants who had demonstrated that the plaintiff's civil rights suit had been brought in bad faith and vexatiously. The Ninth Circuit has apparently not addressed the question whether any pro se plaintiff or a pro se non-attorney defendant in such an action can recover such an award. *Cf.* Hannon v. Security Nat'l Bank, 537 F.2d at 328-29 (pro se non-attorney may not recover fees under Truth in Lending Act, 15 U.S.C. § 1640(a)). As the Ninth Circuit noted in *Ellis*, an award of fees for a defendant serves different purposes from those served by an award in favor of a prevailing plaintiff. 625 F.2d at 230-31; *see* Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295, 1301 (9th Cir. 1981).

"amended" bills of costs, adding to her claims various expenses incurred in attempting to recover an award of attorney's fees. In light of this court's ruling that she is not entitled to such an award, these additional items may not be taxed as costs. Accordingly, the court will strike the plaintiff's amended and second amended bills of costs and will limit plaintiff Kessler's recovery of costs to any items correctly taxed in her original bill of costs of February 15, 1983.

Plaintiff Kessler may not tax as costs the fees paid to the clerk of this court at the initiation of this lawsuit on January 30, 1981. Those fees were listed in the bills of costs filed on May 29, 1981, and taxed on June 5, 1981. Moreover, plaintiff Kessler's bill of costs of February 15, 1983, was filed long after the entry of final judgment on April 29, 1981, and the present filing of her bill of costs as to items that were then taxable is untimely. *See* Local Court Rule 351.1. The stipulation of deferral cited by plaintiff Kessler on its face applies only to the issue of attorney's fees and does not support her assertion that the defendants agreed to defer consideration of other costs. Thus, the only costs taxable in the bill of costs of February 15, 1983, are those costs expended by the plaintiffs in opposing the defendants' motion for relief from judgment.

One item listed on the bill of costs, for printing a brief filed in the Supreme Court, is clearly not taxable in this or any other court. *See* Sup.Ct.R. 50.3. However, the record does not permit the court to determine whether the remaining items are taxable. Defendants charge generally that many of the expenses listed by plaintiff may

not be taxed. They do not address specifically each of the items listed. Nor have they discussed any item in light of the holding of the Eleventh Circuit in *Dowdell v. City of Apopka, Florida,* 698 F.2d 1191 (11th Cir. 1983), that "with the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988." *Id.* at 1192. Plaintiff Kessler's filings have been no more elucidating. Although she has provided the court with photocopies of cancelled checks and copies of bills for particular expenses, she has not demonstrated that each was necessary to the plaintiff's opposition to the motion for relief from judgment. While it appears that a few of these expenses, dating from 1981 and early 1982, can bear no relation to the defendants' motion for relief from judgment, the relevence or necessity of most of the items cannot be determined.

In light of the above, the court will defer further consideration of the instant motion and will allow the parties an opportunity to supplement their fillings [*sic*] with regard to the remaining items listed. *Cf. Johnson v. University College of the University of Alabama in Birmingham,* 706 F.2d 1205, 1209 (11th Cir. 1983). Plaintiff Kessler will be permitted thirty (30) days from the date of entry of this order within which to file any such supplement. Defendants will be permitted thirty (30) days from receipt of any such supplement within which to file a response.

III. William Hollberg's Application for Attorney's Fees

By letter dated September 17, 1983, William Hollberg has informed the court that the parties have reached agreement on the fees to be paid to Mr. Hollberg for his participation on behalf of the plaintiffs in this action. The court therefore will deem Mr. Hollberg's application withdrawn.

* * *

Accordingly, plaintiff Kessler's application for attorney's fees is DENIED. Plaintiff Kessler's motion to compel answers to interrogatories and the defendants' motion for a protective order are DENIED as moot.

Defendants' motion for review of taxation of costs is DENIED as moot as to review of the bill of costs submitted by Mr. Rucker. As to the bills of costs submitted by plaintiff Kessler, the defendants' motion is GRANTED IN PART with respect to her amended and second amended bills of costs and with respect to certain items in the original bill of costs, identified above in this order. Further consideration of defendants' motion with respect to review of the taxation of the remaining items is DEFERRED. The parties are PERMITTED to supplement their filings with respect to the remaining items as set forth above in Part II of this order.

The application of William Hollberg for attorney's fees is DEEMED withdrawn.

SO ORDERED, this 6th day of October, 1983.

/s/ Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX PART III

Appellate Court Judgment

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8076

D.C. Docket No. 81-199

ELIZABETH D. DUNCAN, ET AL.,

Plaintiffs-Appellants,

versus

DAVID B. POYTHRESS, ET AL.,

Defendants-Appellees.

Entered December 12, 1985

Appeal from the United States District Court for the Northern District of Georgia

---

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.*

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the

---

*Judge James C. Hill recused himself and did not participate in this decision.

same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for a determination of the amount of Kathleen Kessler's fee award in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

GODBOLD, Chief Judge, dissented and filed an opinion.

RONEY, Circuit Judge, dissented and filed an opinion in which HENDERSON, Circuit Judge, joined.

Entered: December 12, 1985

For the Court: Spencer D. Mercer, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE:

_____

(2)

No. 85-1235

In The

Supreme Court of the United States

October Term, 1985

DAVID B. POYTHRESS, as Secretary of State, State of Georgia; MAX CLELAND, as successor Secretary of State, State of Georgia; GEORGE D. BUSBEE, Individually and as Governor of the State of Georgia; JOE FRANK HARRIS, as successor Governor of the State of Georgia; JESSE G. BOWLES; and HARDY GREGORY, JR., as Associate Justice, Supreme Court of Georgia,

Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT, and KATHLEEN KESSLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

KATHLEEN KESSLER
Attorney for Respondent
218 Healey Building
Atlanta, Georgia 30303
(404) 524-1440

COCKLE LAW BRIEF PRINTING CO., (800) 835-1427 Ext. 333

16pp

QUESTION PRESENTED

Whether attorneys who proceed pro se should be treated like other attorneys (prevailing plaintiff's attorneys presumptively entitled to fees) for the purposes of 42 U.S.C. § 1988.

PARTIES

The parties are George D. Busbee, Individually and as former Governor of Georgia; Joe Frank Harris, Governor of Georgia; Jesse G. Bowles, former Associate Justice of the Supreme Court of Georgia; David B. Poythress, former Secretary of State of Georgia; Max Cleland, Secretary of State of Georgia; Hardy Gregory, Jr., Associate Justice of the Supreme Court of Georgia, as Petitioners/Defendants; and Kathleen Kessler as Respondent/Plaintiff. Plaintiffs Duncan and Stout no longer have an interest in this lawsuit as the relief sought under 42 U.S.C. § 1983 has been granted and their attorneys' fees paid by Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No. 85-1235

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

DAVID B. POYTHRESS, as Secretary of State, State of Georgia; MAX CLELAND, as successor Secretary of State, State of Georgia; GEORGE D. BUSBEE, Individually and as Governor of the State of Georgia; JOE FRANK HARRIS, as successor Governor of the State of Georgia; JESSE G. BOWLES; and HARDY GREGORY, JR., as Associate Justice, Supreme Court of Georgia,

Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT, and KATHLEEN KESSLER,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

BRIEF FOR RESPONDENT IN OPPOSITION

—o—

Respondent respectfully prays denial of the petition for certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit *en banc*, entered on December 12, 1985.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988, pertinent part:

". . . In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

After representing prevailing parties in a lawsuit for an election necessary when Georgia's Governor appointed a successor Supreme Court Justice contrary to statute,[1] Attorney Kessler applied for fees pursuant to 42 U.S.C. § 1988.

Attorney Kessler represented Plaintiffs Duncan and Stout until time of trial. Plaintiffs and their attorneys then decided that it was important for Kessler to testify to a meeting with former Justice Bowles. The trial court would not allow Kessler to testify and also represent the other two plaintiffs. Kessler withdrew as attorney for Duncan and Stout, became a plaintiff, and testified as to uncontested matters.

Later on appeal and to date, Kessler represented herself in the litigation, appearing in this Court and on remand to the trial court as attorney for Plaintiff Kessler only.

[1]The Supreme Court has once reviewed this case on the merits and dismissed the State Defendants' writ of certiorari, POYTHRESS v. DUNCAN, 459 U.S. 1012 (1982).

At no time did Petitioners object to Attorney Kessler representing Plaintiff Kessler. No motion for disqualification was filed. The trial court also did not voice an objection, even though Attorney Kessler personally appeared before the court on remand representing herself.

The Petitioners/Defendants paid $128,000 to two other attorneys representing Plaintiffs, but protested Kessler's fees.

The question before this Court is whether a prevailing attorney/plaintiff representing herself is entitled to fees pursuant to 42 U.S.C. § 1988. The Eleventh Circuit in panel and *en banc* decisions said, "Yes."

REASONS FOR DENYING THE WRIT

I. Eleventh Circuit's decision is consistent with the only other circuit court decision on whether an attorney/plaintiff pro se may recover a fee under § 1988.

"Only one Court of Appeals, the Ninth Circuit, has considered the issue of whether a lawyer litigant proceeding pro se is entitled to attorney's fees under section 1988. *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980). The *Ellis* Court determined that defendants who were attorneys and who represented themselves were entitled to fees. Although *Ellis* is unlike the present case in that it concerned an attorney pro se defendant, the *Ellis* court's reasoning is, in large part, applicable to the present case. Indeed, *Ellis* was cited as persuasive authority in *Rybicki v. State Board of Elections*, 584 F.Supp. 849 (N.D.Ill. 1984) (three-judge court) where an attorney pro se plaintiff was granted

fees under section 1988. *But see Lawrence v. Staats,* 586 F.Supp. 1375 (D.D.C.1984) (attorney pro se plaintiff not entitled to fees).'"[2]

Eleventh Circuit Opinion [hereinafter "Opinion"], Petitioners' App. 5.

The cases cited by Petitioners all involve *non-attorney* pro se plaintiffs (frequently "jailhouse lawyers")[3] Even the non-attorney pro se cases recognize the distinction between attorney and non-attorney pro se plaintiffs for purposes of fee awards. See cases cited in Opinion, Petitioners' App. 6, n.8.

Petitioners' reasoning for putting all pro se litigants in the same category is "they do not need to hire an attorney to enforce their rights." Petitioners' brief, p.6. However, the financial need of the litigant is not the determinative factor in awarding fees under § 1988. *Blum v. Stenson,* — U.S. —, 104 S.Ct. 1541 (1984), *Johnson v. University College,* 706 F.2d 1205, 1210 (11th Cir.), cert. denied, 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983); *Riddell v. National Democratic Party,* 624 F.2d 539, 543 (5th Cir.1980); *Ellis v. Cassidy,* 625 F.2d 227,230 (1980).

"Moreover, contrary to the implication of defendants' argument, the fact that Kessler is a lawyer and therefore can (and did) provide legal representation to herself, does not mean that she does not need section 1988 in order to enable her to pursue a case like the present one. Merely because plaintiff Kessler need not pay an actual fee to attorney Kessler does not mean that she is able to spend the time and pay the overhead involved in this case, absent at least a hope

---

[2]*Lawrence* relied on the trial court's decision in *Duncan v. Poythress,* 572 F.Supp. 776 (N.D.Ga.1983), now reversed, as authority to deny fees.

[3]The one exception is *Lawrence v. Staats.* See n.2, *supra.*

of remuneration. [Cite] In fact, preclusion of other employment by the attorney is one of the *Johnson* factors. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d at 718."

Opinion, Petitioners' App. 8-9.

Petitioners have repeatedly failed to distinguish between prevailing party lawyer and layman. The two circuits to decide the issue in § 1988 fee cases have made such a distinction and are not in conflict.

As to part I, B of Petitioners' brief, no circuit court decision is cited, and there are none in conflict with the Eleventh Circuit's decision.

II. Eleventh Circuit's decision promotes the purposes of the fee act and the plain language of the act.

"[A] more general purpose of section 1988 is to encourage private citizens to vindicate important constitutional and congressional policies. [Cites]."

". . . 'The primary concern of Congress was to increase the level of competence with which such complaints are prosecuted. . . .' [*Duncan v. Poythress,*] 572 F.Supp. [776] at 778-79 . . ."

"In the case of an attorney pro se litigant such as Kessler, this congressional purpose is fulfilled. Kessler utilized a lawyer to pursue her claims; therefore, she utilized the kind of skilled advocate competent to pursue her legal claims, as evidenced by a license to practice law, that the framers of section 1988 envisioned."

Opinion, Petitioners' App. 9-10, 12-13.

Further, "[t]he plain language of section 1988 does not preclude an award of fees to a lawyer representing

herself." Opinion, Petitioners' App. 6-7. A member of the bar who advocates for the prevailing party and wins, is eligible for fees, as the statute does not exclude any class of attorneys. The Court of Appeals examined several arguments and found no justification for treating attorneys pro se differently from any other attorney under 42 U.S.C. § 1988. Opinion, Petitioners' App. 7-18.

III. No significant issue is presented in the writ for Supreme Court consideration.

A. The Court of Appeals correctly decided that the attorney/witness rule cannot logically apply to an attorney/plaintiff pro se.

Petitioners' concern that the Court of Appeals is overriding the advocate/witness rule is misplaced:

> "The ethical canons do not prohibit a lawyer from representing himself or herself [cites], and logic tells us that such a pro se litigant often testifies on his or her own behalf."

Opinion, Petitioners' App. 17-18, n.21.

Further, the advocate/witness rule applies to an attorney representing *another*,[4] not himself:

> " 'To apply DR 5-102 when the testifying advocate is a litigant in the action miscomprehends the thrust of the rule. DR 5-102 regulates lawyers who would serve as counsel and witness for a party litigant. It does not address that situation in which the lawyers *is*

[4]While it is customary for an attorney to have another person as a client, there is no prohibition against an attorney filling both capacities as attorney and client. See, e.g., 11 U.S.C. §§ 327(a) & (d), bankruptcy code, permitting "the court to authorize the trustee, if qualified, to act as his own counsel." House Report No. 95-595, 95th Cong., 1st Sess. 328 (1977).

> the party litigant.' . . . *Borman v. Borman,* 378 Mass. 775, 393 N.E.2d 847, 856 (1979)."

Opinion, Petitioners' App. 18, n. 21.

The advocate/witness rule cannot logically apply to a party representing himself.

Petitioners' ethical concerns come late in the case and are argued for the first time to the Eleventh Circuit on fee appeal. Opinion, Petitioners' App. 10, n.14.

The facts do not present a case for testing the advocacy/witness rule. It is not endangered by the Court of Appeals' decisions, which carefully considered and correctly disposed of this issue.

B. A case brought for the vindication of important constitutional rights is not evidence of a "cottage industry."

Duncan v. Poythress cannot be fairly characterized as a "cottage industry" situation. Plaintiffs were successful in obtaining an important constitutional right—the elective franchise—for all Georgians, which is the type of lawsuit § 1988 was intended to encourage. See, Opinion, Petitioner's App. 16.

Further, in order to be entitled to § 1988 fees, plaintiffs must have the skills to prevail. Their claims must be found meritorious. In *Duncan,* the trial court found plaintiffs' claims meritorious and expressly ordered attorneys' fees. Two of the three attorneys have been paid. Now the third attorney who worked alongside the other two attorneys is petitioning for fees in the same action. The case has not suddenly become a "cottage industry" action for purposes of denying fees to the third attorney.

The small number of cases concerning fees for attorney/plaintiffs under § 1988 shows that the attorney representing himself in § 1983 litigation is a very rare situation. The "cottage industry" theory is not supported by facts or the small number of attorney pro se cases. See, Opinion, Petitioners' App. 16.

C. "Jailhouse lawyers" and other non-attorney pro se parties will not receive fees by the Eleventh Circuit's decision.

Notwithstanding Petitioners' predictions,[5] *Duncan* specifically distinguished and did not overrule *Cofield* and other cases refusing fees to non-attorney pro se parties. *Cf. Duncan v. Poythress,* — F.2d — (Dec. 12, 1985) (Petitioners' App. 1-33) with *Cofield v. City of Atlanta,* 648 F.2d 986 (5th Cir. Unit B, 1981).

———o———

CONCLUSION

Respondent respectfully prays denial of Petitioners' writ because the requirements for review by writ of certiorari are not present in the issues of this lawsuit:

(1) No circuit court is in conflict with the Court of Appeals' decision;

(2) No Supreme Court decision is in conflict with the appealed decision;

(3) The decision conforms to the language and purposes of the fee act, 42 U.S.C. § 1988;

---

[5]Petitioners' brief, p.8, n.7.

(4) In practice, very few § 1983 attorney pro se cases exist. The legal issue involved is of concern to the parties and it is a matter for appellate policy, but it is not of such national significance as to require the attention of the United States Supreme Court.

Respectfully submitted,

KATHLEEN KESSLER
Attorney for Respondent
218 Healey Building
Atlanta, Georgia 30303
(404) 524-1440

SUPREME COURT OF THE UNITED STATES

DAVID B. POYTHRESS ET AL. *v.*
KATHLEEN KESSLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-1235. Decided April 21, 1986

The petition for a writ of certiorari is denied.

THE CHIEF JUSTICE, with whom JUSTICE WHITE joins, dissenting.

This petition presents the question whether a prevailing plaintiff, a lawyer, who acted for herself may recover attorneys' fees under 42 U. S. C. § 1988. The Courts of Appeals have uniformly held that a *pro se* litigant may not recover attorneys' fees under § 1988, since such a litigant does not require the assistance of an attorney to enforce his rights. *Lovell* v. *Snow*, 637 F. 2d 170 (CA1 1981); *Pitts* v. *Vaughn*, 679 F. 2d 311 (CA3 1982); *Cofield* v. *City of Atlanta*, 648 F. 2d 986 (CA5 Unit B 1981); *Rhewark* v. *Shaw*, 628 F. 2d 297 (CA5 1980), *cert. denied* —— U. S. —— (1984); *Davis* v. *Parratt*, 608 F. 2d 717 (CA8 1979); *Turman* v. *Tuttle*, 711 F. 2d 148 (CA10 1983).

Here, the Court of Appeals for the Eleventh Circuit required the District Court to award fees to respondent Kathleen Kessler, who is an attorney, even though she was proceeding *pro se*. In the analogous context of attorney fee awards under the Freedom of Information Act, 5 U. S. C. § 552(a)(4)(E), the Courts of Appeals have reached conflicting conclusions concerning whether a *pro se* plaintiff who is also an attorney is entitled to fees. *Compare Falcone* v. *Internal Revenue Service*, 714 F. 2d 646 (CA6 1983) (attorney-litigant denied fees), *cert. denied* —— U. S. —— (1984) *with Cazalas* v. *United States Department of Justice*, 709 F. 2d 1051 (CA5 1983) (attorney-litigant entitled to fees). District

courts have also reached conflicting determinations concerning an attorney-plaintiff's eligibility for fees under § 1988. *Compare Rybicki* v. *State Board of Elections*, 584 F. Supp. 849 (N. D. Ill. 1984) (attorney-plaintiff entitled to fees) *with Lawrence* v. *Staats*, 586 F. Supp. 1375 (D DC 1984) (attorney-plaintiff denied fees).

Because the award of fees under § 1988 and under the Freedom of Information Act have much in common, and because the award of fees in this case is in conflict with the general rule against the award of fees to *pro se* litigants, I would grant certiorari in order to resolve the conflicting decisions in the lower federal courts.